Supreme Court, U.S.
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No. 97-49

In The

Supreme Court of the United States

October Term, 1997

PORTLAND GENERAL ELECTRIC COMPANY,
Petitioner,

v.

COLUMBIA STEEL CASTING CO., INC.
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITIONER'S REPLY TO BRIEF IN OPPOSITION

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ADDITIONAL PARTIES TO THE PROCEEDING

The case caption contains the names of all the parties to the proceeding in the Court of Appeals.

Since the date the Petition was prepared, the stock of Petitioner Portland General Electric Company has been acquired by Enron Corporation. Enron Corporation has a partial interest in the following entities:

Alliance Resources Plc.
Beau Canada Exploration Ltd.
Comstock Resources, Inc.
Enron Capital L.L.C.
Enron Capital Resources L.P.
Enron Capital Trust Resources L.P.
Enron Capital Trust I and II
Enron Global Power and Pipelines L.L.C.
Enron Oil & Gas Company
EOTT Energy Partners, L.P.
Forest Oil Corporation
Hanover Compressor Company
Northern Border Partners, L.P.
Place Resources Corp.
Queen Sand Resources, Inc.
Titan Exploration, Inc.

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I. This case is not factbound

Columbia Steel's brief begins by disputing the facts in order to persuade the Court that this case is factbound.

1. Columbia Steel's brief is not trustworthy.

The first reason this case is not factbound is that Columbia Steel's account of the facts is unreliable. For a quick demonstration of just how unreliable, consider Columbia Steel's two-page argument (at pp. 8-10) that OPUC did *not* regard Portland as having been allocated between PGE and PP&L. In our petition we had demonstrated the opposite, that OPUC had asserted for many years that Portland was allocated and that competition was forbidden. (Pet. 5-7, 18-19.) In fact, that was the very reason Columbia Steel demanded an injunction against OPUC. Compare then what Columbia Steel alleged in its complaint against OPUC in 1990 with its opposite statement now to this Court:

Columbia Steel's brief in this Court	**Columbia Steel's complaint in 1990**
"Contrary to PGE's assertions, the OPUC did not insist that it had allocated exclusive service territories in Portland until a 1992 Order that came long after the causes of action in this case arose." (Columbia Steel's brief at 9.)	"The OPUC contends that the [1972 Agreement] created allocated service territories within Portland and that PP&L is barred from providing electric service to Columbia Steel. . . Columbia [Steel] is entitled to an injunction prohibiting [OPUC] from seeking to enforce the [1972 Agreement] as an exclusive service territory agreement." (ER 35, 38.)[1]

[1] OPUC declared in its answer to this allegation that it *did* so [continued]

A party cannot render a case factbound by inventing new facts on the spot to suit the occasion. Columbia Steel doesn't even acknowledge that the District Court made a finding of fact opposite to what Columbia Steel would have this Court believe. (*See* Pet. at 11.) Space does not permit us to respond to every misleading statement of fact in Columbia Steel's brief.

2. The factual disputes were resolved against Columbia Steel in the prior state adjudication.

The main thrust of Columbia Steel's argument is that the 1972 Order was insufficient *under Oregon law* to effect an allocation of Portland. Most of the supposed facts in Columbia Steel's brief are in aid of that argument. It is the same argument, and the same facts, that Columbia Steel presented seven years ago in the OPUC proceeding. (To appreciate that it is the same, we invite the Court to glance at the Supplemental Appendix in the back of this brief, where we reproduce the table of contents of one of Columbia Steel's briefs in state court in 1992; *see especially* the last page.) OPUC rejected that argument, as did the Oregon courts to which Columbia Steel appealed. This case can become factbound only if the prior state adjudication upon these same facts is dishonored. The "Questions Presented" at the front of Columbia Steel's brief all assume that the final state adjudication was wrong.

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contend. (ER 75, ¶ 28.) OPUC went on to add that what created the allocated territories was its 1972 Order, not the parties' Agreement: " [OPUC contends] that Order No. 72-870, as opposed to the [1972 Agreement] created service territories within Portland." *Id.*

Columbia Steel disparages that prior state adjudication, complaining that OPUC disregarded "overwhelming evidence to the contrary." (Columbia Steel brief at 19.) Columbia Steel protests that the Oregon trial court which conducted the first level of judicial review affirmed OPUC "without any evidentiary hearing,"[2] and that the Oregon appellate courts gave the OPUC order a "cursory review."[3] (Columbia Steel brief at 18, 19.) To appreciate how skewed is Columbia Steel's criticism of the procedural adequacy of the state proceeding, we encourage the Court to review OPUC's refutation at Appendix N 3-5.

That Columbia Steel finds it necessary to attack the prior state adjudication is a sign that Columbia Steel cannot effectively distinguish it. As we pointed out in our petition (at 8-9, 26-27), the state adjudication explicitly held that the 1972 Order satisfied all the requirements of the Oregon statutes for an allocation of territories and customers, and that Portland had therefore been lawfully allocated under Oregon law in *1972*. Columbia Steel's brief refuses to face that explicit holding in the state adjudication, and pretends the holding was something else, something it finds easier to attack.[4]

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2 This was the procedure the Oregon statutes required the trial court to follow. Review of the OPUC decision must be on the record established at the OPUC. Or. Rev. Stat. 756.598.

3 That the Oregon Court of Appeals affirmed without opinion does not warrant the pejorative label "cursory review." The case was briefed fully and argued to the Oregon Court of Appeals. The disposition without opinion tells us rather that the Oregon Court of Appeals found little merit in Columbia Steel's arguments.

4 Although Columbia Steel persists in arguing that the 1972 Order was inadequate under *Oregon* law, it nevertheless refuses to face the OPUC's legal analysis as to why the 1972 Order *was* effective under Oregon law to allocate Portland. If the Court were to examine OPUC's analysis beginning at App. M-16, it would see that Columbia Steel never deals with OPUC's reasoning, but

3. Columbia Steel's supposed facts flout the summary judgment standard.

Many of Columbia Steel's supposed facts attribute devious motives to PGE and attack PGE's good faith. Columbia Steel is hawking an extreme view of the evidence in complete disregard for the standard of review on summary judgment. Even the District Court rejected Columbia Steel's extreme view:

> "[This court] has never ruled or implied that PGE acted in bad faith, but no belief, however reasonable it may have been, alters the legal effect of the 1972 Agreement and Order No. 72-870 of the OPUC." (App. F-18.)[5]

The bottom line is that OPUC told PGE that Portland was allocated, and PGE did as it was told. There is nothing nefarious about that.

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attacks a series of straw men instead. In our petition, we pointed out some of OPUC's reasons that the Court of Appeals' opinion avoided addressing. (Petition at 13-14, 27-28.) The Court may note that Columbia Steel's brief also avoids them.

On the other hand, Columbia Steel's brief (at 7) grudgingly acknowledges that the 1972 Order expressly declared that a customer did not have the right to choose between the two utilities. (*Cf.* Petition at 5.) Columbia Steel also acknowledges (at 7) this would have constituted illegal discrimination in the eyes of OPUC. Yet it offers no explanation why it was entitled to treble damages for being denied the same unlawful discriminatory treatment.

5 But having a reasonable belief that the 1972 Order suppressed competition means that PGE's actions were prompted by that belief, and by a desire to obey the law, rather than by a supposed illegal conspiracy in restraint of trade. On that issue PGE was at least entitled to a trial. *See infra* at 10.

II. Columbia Steel's legal arguments are in error

The issues for this Court are legal, not factual. What is more, they are issues of federal law, not Oregon law. As to the issues of federal law, there are several significant errors in Columbia Steel's brief.

1. The Court of Appeals' amendment to the "clear articulation" requirement is in error.

Columbia Steel would defend the Court of Appeals' new amendment to the state action doctrine by characterizing the Oregon statute as "not self-effectuating." (Columbia Steel brief at 13.) That is, the Oregon statute requires a state administrative agency---OPUC---to approve the restraint on competition in a particular case. According to Columbia Steel, that shifts the focus of the "clear articulation" test to the 1972 Order (and only the 1972 Order).

This won't withstand scrutiny. The Oregon allocation statute is like most other statutes in state action cases, in that the statute articulates a policy in favor of displacing competition, and designates a state agency to supervise the details.[6] It is therefore just like *Ticor*[7] and *Southern Motor Carriers*[8], where this Court treated what the agency does as a question of active supervision. After all, if the statute had *not* provided for state agency approval of the particular restraint--if it had been "self-effectuating," in Columbia Steel's

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6 For example, the Oregon allocation statute is substantially identical in design to the North Carolina statute in *Southern Motor Carriers*, N.C. Gen. Stat. § 62-152.1(b).

7 *F.T.C. v. Ticor Title Insurance Co.*, 504 U.S. 389 (1992).

8 *Southern Motor Carriers Rate Conference v. U.S.*, 471 U.S. 48 (1985).

phrase---it would have failed the state action test for lack of active supervision. That was precisely what happened in *Patrick v. Burget,* 486 U.S. 94, 100 (1988). That *this* Oregon statute (unlike the Oregon statute in *Patrick*) requires a state agency to approve the particular restraint means that *this* restraint can pass the active supervision test (unlike the restraint in *Patrick).* It does not mean, as Columbia Steel would have it, that the focus of the clear articulation requirement somehow shifts from the statute to the 1972 Order.

Why does this analytic question matter? Because this new version of the state action doctrine is a wedge by which the Court of Appeals created an opening to interfere in the state administrative process. If the Court of Appeals had simply asked: does OPUC actively supervise the market division in Portland?---the answer was plainly yes. The answer would still have been yes, even if the question had been: has OPUC clearly articulated that Portland has been allocated? But the new version of the clear articulation requirement led to a very different question: whether, in the opinion of the Court of Appeals, OPUC adequately dotted the i's and crossed the t's of *Oregon law* in the 1972 Order, so as to provide a sufficient justification under *Oregon law* for OPUC's active enforcement of the market division in Portland. By reformulating the state action doctrine in this way, the Court of Appeals invented a tool for rejecting the conclusions of state agencies and state courts about state law, thereby creating conflicting duties on parties who are subject to the state law, and forcing a party like PGE into a Catch-22. The danger this Court warned against in *Omni*[9] has now materialized and taken root.

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9 *City of Columbia v. Omni Outdoor Advertising,* 499 U.S. 365, 370-72 (1991).

In this case, it put PGE in an impossible conflict between the opposite messages from OPUC and the federal court, and PGE made the choice to transfer Columbia Steel to PP&L to stop treble damages from accruing further. It is disingenuous for Columbia Steel to suggest that PGE thereby conceded the rightness of Columbia Steel's position. (Columbia Steel brief at 11.) The District Court had already refused to defer to OPUC (App. D). Events have proved that PGE and its counsel correctly understood this and other signals emanating from the District Court.

2. The issues were fully raised before the Court of Appeals.

Columbia Steel is flatly wrong in telling this Court that PGE did not adequately preserve its arguments below. (Columbia Steel brief at 15.) PGE made the same argument in its briefs to the Court of Appeals that it makes now about the proper application of the two prongs of the state action doctrine. (*See, e.g.*, PGE opening brief at 20-22; PGE answering brief at 11-12.) The Court of Appeals then invented this new addition to the state action doctrine, which PGE has challenged ever since the Court of Appeals first articulated it.

3. Columbia Steel confuses the issue of the state's "intent."

The Court of Appeals was confused about the issue of "intent," and Columbia Steel augments that confusion.

First, that the intent of the state *is* relevant transpires from Columbia Steel's own quotations from this Court's

precedents, which state the importance of the state's intent.[10] There is no question that OPUC is an arm of the state of Oregon, that it *intended* to suppress competition in Portland, and said so, long before Columbia Steel's cause of action supposedly arose.

Second, it *would* be irrelevant to inquire whether an OPUC official had some improper subjective intent for his or her action in suppressing competition in Portland. That is what was at stake in *Omni*, when this Court cautioned against probing of "intent." (*See* Columbia Steel brief at 13-14.) There is no such issue of subjective intent here.

4. Columbia Steel's argument is not supported by Areeda & Turner.

Columbia Steel invokes the authority of Professors Areeda and Turner for the proposition that the 1972 Order must itself pass the "clear articulation" test. (Columbia Steel brief at 14 n. 11.) The quotation from their text, however, is aimed at conduct that is "not intended by the state." PGE's conduct was certainly intended by OPUC and clearly articulated by OPUC, whether in the 1972 Order or not. The quotation also dates from 1978, before the crystallization of the state action doctrine into the two prong test of *Midcal*.[11] It is through that two prong test that the concerns articulated by Areeda and Turner have since been addressed.

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10 *See, e.g.*, Columbia Steel's quotations from *Ticor* at 15-17 of its brief.

11 *California Retail Liquor Dealers Assn. v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980).

5. The Court of Appeals failed to give full faith and credit to the state adjudication.

The issue in the federal antitrust claim was the state action defense: whether the state had acted to require PGE to treat Portland as an allocated territory. The issue decided in the state adjudication was that the state had imposed that requirement. The judgment below cannot stand without doing violence to the state adjudication. As things stand now, a final state judgment holds that competition in Portland was unlawful under Oregon law after 1972, while a federal judgment holds the opposite.

6. The decision below is in conflict with *Praxair*.

Columbia Steel's purported distinction of *Praxair*[12] is transparently inadequate. In both cases, the question was whether the state agency had made an adequate allocation of the particular territory in question. The Eleventh Circuit held that the District Court erred in not considering conduct after the issuance of the order. That is manifestly the holding of the case, not dicta as Columbia Steel would have it. (Compare PGE's petition at 24 with Columbia Steel's brief at 21.)

III. These issues arise often and are of the greatest importance.

It is because deregulation of the electric utility industry is taking place that the decision below becomes even more important. It is understood throughout the government

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12 *Praxair, Inc. v. Florida Power & Light Co.*, 64 F.3d 609 (11th Cir. 1995), cert. denied, __ U.S. __, 116 S. Ct. 1678, 134 L.Ed. 2d 781 (May 13, 1996).

and industry that part of the utility business must remain a legal monopoly---the transmission of electricity to end users--while another part will become competitive. Over the next decades, there will be many orders of many state commissions attempting to explain how the utilities must compete, and how they must not. These orders should not be vulnerable to the kind of punitive second-guessing of state action engaged in by the Court of Appeals.

The issue also transcends the utility industry. The error of the Court of Appeals can undermine state control of state administrative process in any area.

IV. PGE was deprived of a trial.

PGE does not here dispute whether the trial of which it was deprived should have been a jury trial. The unfairness is that PGE was allowed no trial at all, and was instead determined by summary judgment to have been an illegal conspirator because it obeyed state orders.

Respectfully submitted,

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SUPPLEMENTARY APPENDIX TO
PETITIONER'S REPLY

(Table of Contents of one of Columbia Steel's briefs in state court)

In the Circuit Court of the State of Oregon
For the County of Marion

COLUMBIA STEEL CASTING CO., INC.,	)	Case No. 92C 12005
Plaintiff,	)	COLUMBIA STEEL CASTING CO. INC.'S MEMORANDUM IN OPPOSITION TO PUBLIC UTILITY COMMISSION OF OREGON'S MOTION FOR SUMMARY JUDGMENT
vs.	)	
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